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UNITED STATES OF AMERICA, :
 : S1 05 Cr. 1102 (JFK)
-against- :
 : OPINION and ORDER
EPIFANIO LABRA, :
 :
Defendant. :
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For the United States of America:
MICHAEL J. GARCIA
United States Attorney for the
Southern District of New York
New York, New York
Of counsel: Leslie C. Brown
Richard C. Daddario
Assistant United
States Attorneys

JOHN F. KEENAN, United States District Judge

JOHN F. KEENAN, United States District Judge:

Background

Defendant is charged in a two-count superseding indictment with Transportation of a minor with intent to engage in criminal sexual activity (18 U.S.C. § 2423(a)) and Travel with intent to engage in illicit sexual conduct (18 U.S.C. § 2423(b)).

He has moved to suppress post-arrest statements allegedly made by him, through a Spanish interpreter, to Special Agent Keith Kolovich of the Department of Homeland Security, Immigration and Customs Enforcement ("ICE"). An evidentiary hearing was held on the motion on January 9 and 10, 2006 at which Agent Kolovich, the Spanish translator ICE Agent Michael Ortiz, Luis Rodriguez, a Job Opportunity Specialist at the Human Resources Administration, and the defendant himself testified.

Factual Findings

On October 13, 2005, Agent Kolovich and a New York City Detective transported Labra from Central Booking to the Bronx Special Victims Squad. (Tr. 17, 29).¹ The defendant was placed in an interview room where he was handcuffed to a bar on the wall. (Tr. 29-30). Ten to fifteen minutes later, Agent Kolovich, an experienced agent, and ICE Agent Michael Ortiz went into the interview room. (Tr. 17, 30, 82, 85). The handcuffs were removed. (Tr. 30, 85). After being uncuffed, but before

¹ "Tr." refers to the Transcript page at the hearing.

questioning began, the defendant, in Spanish, was advised of his Miranda rights. (Tr. 30-31, 85-86).

Agent Ortiz, the interpreter, has spoken fluent Spanish since childhood. He advised the defendant of his Miranda rights, in Spanish, (Tr. 83-86), reading from a pre-printed card, which contained the Miranda warnings in English and in Spanish. (Tr. 86). Agent Ortiz asked the defendant whether he understood each right. (Tr. 87-88). The defendant told Agent Ortiz, in Spanish, that he understood his rights. (Tr. 88). Having read the warnings from the pre-printed card, Ortiz then translated a pre-printed Miranda waiver form for the defendant. (Tr. 88). The waiver form also contained each of the defendant's Miranda rights. (Tr. 88). Labra signed the waiver form. (GX2). Labra never said or indicated that he did not understand his rights or any of the Spanish words Agent Ortiz used. (Tr. 88).

Agents Kolovich and Ortiz testified that Labra's answers were responsive to Kolovich's questions (which Agent Ortiz translated from English to Spanish). On a few occasions, the defendant spoke uninterrupted in Spanish for as long as one minute. (Tr. 35, 92). Agent Ortiz testified that he had no difficulty understanding the defendant's Spanish. (Tr. 92). Both agents testified that Labra did not say or indicate that he did not understand any of the questions Agent Ortiz asked during the interview. (Tr. 35-36, 88, 90-92).

Approximately eight months before the arrest, Labra applied for public assistance benefits at the Human Resources Administration and he was interviewed by Luis Rodriguez, an employee at that office. (Tr. 135). The interview lasted approximately 45 minutes. It was conducted in Spanish. (Tr. 135-37, 146; GX4-D). Mr. Rodriguez discussed a number of issues with the defendant, including Labra's assets, monthly expenses, income, employment history, benefits and other detailed financial information. (GX4-D). Each of Labra's answers, in Spanish, was responsive to the question asked. (Tr. 148-51). On one occasion, Labra spoke uninterruptedly, in Spanish, for about one minute. (Tr. 151). At no time did Labra ever say or indicate to Mr. Rodriguez that he did not understand Mr. Rodriguez' questions or his Spanish. (Tr. 151). Mr. Rodriguez also had no difficulty understanding the defendant's Spanish and no reason to question Labra's proficiency in Spanish. (Tr. 151-52).

In paragraph 2 of his Declaration in Support of the Motion to Suppress, Mr. Labra stated:

I am a Mexican citizen. Until 2002, I lived in the mountains of Guerrero, Mexico. I grew up speaking Mixteco, the indigenous language of my area. I can speak and understand Spanish at a basic level, but I do not know formal or legal words in Spanish. I cannot understand or speak English. I never went to school. I cannot read or write in any language.

Defendant's version of the questioning on October 13, 2005 is different than the agents'. He claims that he was questioned before being asked to sign anything. (Tr. 192). Further, he argues at footnote 1, page 5 of his Post Hearing Memorandum, that whether he was advised of his Miranda rights is essentially irrelevant "because whether Agent Ortiz accurately told him every word of the advice of rights or not, Mr. Labra's testimony credibly demonstrated that he did not sufficiently understand what was said to him."

The Court rejects that contention and finds that defendant speaks and understands much more Spanish than he is willing to admit for the purpose of these proceedings.

His interview and conversation with Luis Rodriguez at the public assistance office demonstrate that he is fluent in Spanish. Mr. Rodriguez is a disinterested observer with no stake in the outcome of the litigation. A fair analysis and review of the Rodriguez testimony discloses that the defendant had no problem communicating in Spanish some eight months before the custodial questioning at issue here.

On October 14, 2005, the defendant was presented in Magistrate's Court before the Honorable Douglas F. Eaton. The following colloquy ensued:

THE COURT: United States v. Epifanio Labra. Mr. Labra is here in Court. I will now ask the attorneys to state their appearances on the record.

MR. DADDARIO: Good afternoon, Your Honor.
Richard Daddario for the Government.

MS. VON DORNUM: Good afternoon, Your Honor.
Deirdre Von Dornum, Federal Defenders of New York
for Epifanio Labra. Mr. Labra is present next to
me in the courtroom and we have the aid of Nancy
Admiras [Ph.], Spanish interpreter.

I would ask the Court, Mr. Labra's first language
is Masteco² and he can understand Spanish, but he
needs us to go somewhat slowly as he cannot
understand conceptually any technical legal terms.
So to the extent possible if we can try to speak
simply and slowly and I'll have him indicate to me
if he can't understand.

THE COURT: Fine, have you received a copy of the
Pretrial Services Report?

MS. VON DORNUM: We waive the report. I read
the summary they made based on the marshal's
information.

THE COURT: I have here a three-page typewritten
complaint signed by Special Agent Colovich [sic].
Would you stand and raise your right hand?

Do you swear that the allegations in this
complaint against Mr. Labra are true to the best
of your knowledge and belief?

SPECIAL AGENT [K]OLOVICH: Yes, I do.

THE COURT: Mr. Labra, my name is Judge Eaton. I
am a federal magistrate judge. You have been
arrested and charged with federal crimes. To seal
[sic] the details you will have to review this
three-page complaint with your attorney.
Basically, the Government alleges that you
transported a girl under the age of 14 years from
Mexico to the Bronx with the intention to engage
in sexual activity in violation of the law of the
State of New York.

² "Masteco" obviously should read "Mixteco."

I want to warn you that you are not required to make any statement in response to these allegations. If you already have made some sort of a statement you do not need to say anything more now. If you start to make a statement you always have the right to simply stop talking at any time. Any statement that you do make to the authorities can be used against you. Do you understand what I have said so far?

THE DEFENDANT: Yes.

THE COURT: You have the right to employ an attorney of your own choosing at any time. You also have the right to submit a financial affidavit to me and to request me to appoint an attorney for you. I have reviewed the financial affidavit that was filled out by Ms. Von Dornum and signed by you today and I will appoint Ms. Von Dornum to be your attorney free of charge.

THE DEFENDANT: That's good.

THE COURT: It is good. It's very good.

The above quoted exchange, before a judicial officer with a Spanish interpreter and the participation of counsel, shows that Mr. Labia understood the proceedings in Court. Even if the pace of the translation was slowed down, legal terms were used and the defendant understood them. He never expressed an inability to comprehend and his counsel never expressed any difficulty with the translation. This is in stark contrast to the defendant's testimony during this hearing (cf. e.g. Tr. 188, 189).

I find the defendant's credibility seriously impaired by his demonstrably false claim of lack of fluency in Spanish. Further, I find that Agents Ortiz and Kolovich testified

truthfully concerning the Miranda warnings and defendant's understanding of them.

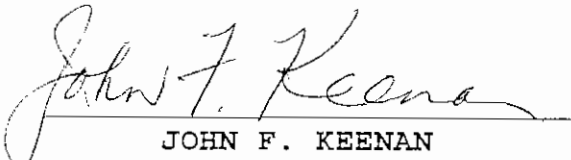
Discussion

At a suppression hearing, the Government has the burden of establishing that a defendant has effectively waived his Miranda rights by a preponderance of the evidence. Colorado v. Connelly, 479 U.S. 157, 168-69, 107 S.Ct. 515, 522-23, 93 L.Ed.2d 473, 485-86 (1986); United States v. Anderson, 929 F.2d 96, 99 (2d Cir. 1991).

The Government has more than met that burden. Although the defendant may not speak Shakespearean English or Cervantes' Spanish, he was effectively warned and waived his right to counsel and to remain silent.

SO ORDERED.

Dated: New York, New York
February 6, 2006


JOHN F. KEENAN
United States District Judge